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CHARLES ELMORE CRO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 194

IN THE MATTER OF THE PROFESSIONAL CONDUCT OF THOMAS HART FISHER,

OTTO KERNER, JR., ROBERT B. JOHNSTONE, PETITIONERS ON BEHALF OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on January 18, 1950, rehearing denied, February 14, 1950.

Opinions Below.

The memorandum opinion of the District Court (R. 729-750) is unreported. The opinion of the Court of Appeals for the Seventh Circuit, and its denial of a petition for rehearing are reported in 179 F. (2d) 361.

Jurisdiction.

The judgment of the Court of Appeals was entered on January 18, 1950. Rehearing was denied by the Court of Appeals on February 14, 1950. (179 F. (2d) 361.) An ex-

tension of 60 days within which to petition for a writ of certiorari was granted by this Court on May 15, 1950. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1254(1).

Questions Presented.

1. Whether, in reviewing a federal disbarment proceeding, the Court of Appeals may reconsider and reweigh the evidence, and substitute its own discretion for that of the trial court.

2. Whether the Court of Appeals is limited, in the exercise of its jurisdiction, to ascertain if there has been great irregularity or an abuse of discretion on the part of the trial court.

3. Whether the Court of Appeals may set aside the findings of fact of the trial court after the Court of Appeals acknowledges specifically that there is no dispute as to the evidentiary facts.

Statement.

Disciplinary proceedings were instituted against Thomas Hart Fisher, a lawyer, at the direction of United States District Judge John P. Barnes of the Northern District of Illinois, pursuant to an order dated January 27, 1947. The order was in the nature of a rule to show cause why Fisher should not be disciplined for his acts and conduct as an attorney (R. 3). Judge Barnes appointed Robert B. Johnstone as counsel for the court (R. 3, 5, 85-86), and later the trial judge ordered that Otto Kerner, Jr., be appointed additional counsel (R. 728).

After the rule to show cause had been served upon Fisher, the matter of his professional conduct was assigned, in the regular manner of assigning new cases in the District Court, to Judge William J. Campbell. On

March 14, 1947, Judge Campbell entered an order directing the court's attorney, Robert B. Johnstone, to file specifications of charges against Fisher, directing Fisher to answer the said specifications, and setting the cause for trial (R. 5).

Twenty-four detailed specifications of charges of unprofessional conduct were filed against Fisher (R. 6-20).* These specifications may be classified for convenience and brevity into five general types of acts of unprofessional conduct, as follows: (1) Undertaking the representation of conflicting interests; (2) Fisher's attempting to use his position as attorney for certain creditors in a bankruptcy proceeding to obtain a financial advantage for himself; (3) Fisher's following a course of action in other litigation to advance his pecuniary interests in disregard of the rights of his clients; (4) Making false representations to the Bankruptcy Court and to his client, and giving false testimony; (5) Conduct in violation of orders of the Bankruptcy Court (R. 730-731).

On March 28, 1947, Fisher filed his answer to the specifications of charges of unprofessional conduct (R. 21), denying each one of them, attacking their legal sufficiency, and containing a motion to dismiss all 24 specifications (R. 21-38). Fisher's motion to dismiss the specifications was sustained only as to specification XVII and was denied as to all of the others (R. 729).

On March 31, 1947, a pre-trial conference was held in open court at the request of counsel for Fisher, and the issues involved in the disciplinary proceedings were discussed. Leave was given to Fisher to file a further detailed answer to the specifications, which he did (R. 51), and the cause was set for trial (R. 50).

---

* The specifications material to this petition, upon which findings of guilty were made, are identified by the appropriate number and are summarized in the appendix to this petition.

Fisher was accorded a full hearing at which evidence was presented in support of the specifications by Robert B. Johnstone, the court's appointed counsel, and evidence was presented on behalf of Fisher *pro se* and by his attorney (R. 75-715).

At the conclusion of the submission of the evidence by the parties, the court took the disposition of the cause under advisement, and an opportunity to file briefs was granted (R. 74, 713-715).

On December 3, 1948, the court entered findings of fact, conclusions of law, and an order disbarring Fisher, with a direction forbidding him from applying for readmission to the bar of the District Court for a period of three years from the date of the order (R. 750). Fisher was found guilty by Judge Campbell of unprofessional conduct as charged in specifications I, II, III, VI, X, XIV, XV, XVI, XVIII, XX and portions of VIII, IX and XXIV (R. 729-750).* These findings of guilty were made by the trial judge after he had, out of an abundance of caution, applied the rule followed in criminal cases, requiring proof of the charges beyond a reasonable doubt (R. 730).

Fisher's subsequent motion for a new trial and rehearing, motion to reopen the case for the presentation of additional evidence, motion for amendment of the court's findings of fact and conclusions of law and for added findings and conclusions, and to vacate or amend the judgment, and his motion for a stay order, staying the judgment of the district court, were denied by Judge Campbell on December 15, 1948 (R. 773).

On appeal, the order of the district court was reversed with directions that it be vacated, although the court below

* See appendix hereto for a summary of these specifications.

acknowledged that there was no dispute as to the evidence. (179 F. (2d) 361, 362, 370.)

Nowhere in its opinion did the Court of Appeals hold or even intimate that the trial court abused its discretion or that it acted arbitrarily, capriciously or unreasonably in disciplining Fisher. Rather, the Court of Appeals reconsidered and reweighed all of the evidence adduced at the trial and substituted its discretion for that of the trial court, although the Court of Appeals acknowledged that the trial court had based its action upon the evidence.

The Court of Appeals found it "necessary to *review* some of the more salient *events*, . . . in order properly to *appraise respondent's* [Fisher's] *conduct* which has resulted in his disbarment." 179 F. (2d) 361, 363. "In our opinion, too much emphasis has been placed upon isolated incidents, some of them frivolous and of no legal consequence, rather than on a consideration of the entire setting and the over-all picture, which is important in making a fair *appraisement of respondent's activities.*" 179 F. (2d) 361, 363. "But even though the conversation took place, Hubbard's version of the same furnishes nothing more than flimsy support for the specification." 179 F. (2d) 361, 368. "While the language may be susceptible of either interpretation it certainly is consistent with respondent's position." 179 F. (2d) 361, 368. "We have considered other numerous unprofessional acts charged against respondent but *are not impressed with their importance.*" 179 F. (2d) 361, 369. (Emphasis supplied.)

These examples of the reviewing court's substitution of its own judgment for that of the district court could be multiplied indefinitely.* Indeed, it can fairly be said that the cause on appeal was tantamount to a trial *de novo.*

* For example the district judge found (R. 738), that "respondent [Fisher, who represented bankruptcy creditors] was at all times concerned with effecting a compromise of all matters involving George

Specifications of Errors to Be Urged.

The Court of Appeals erred:

1. In substituting its discretion and its own independent judgment for that of the district court without holding or even suggesting that the trial court exceeded its authority or acted unreasonably, arbitrarily, or capriciously.

2. Having found that there was "little if any dispute regarding the facts," the reviewing authority of the Court of Appeals was limited to ascertaining whether or not the trial court exceeded its authority in the disciplinary proceedings.

3. In substance and in effect the trial court's findings of fact were set aside by the Court of Appeals without the vaguest intimation that they were in any degree erroneous, thereby doing gross violence to Rule 52(a) of the Federal Rules of Civil Procedure.

4. In reversing the order of the district court.

Joslyn, including the bankruptcy claims and Mrs. Joslyn's alimony, or equitable lien claim, which carried with it his own claim for fees either by virtue of assignment or under state law concerning fees in a divorce action." As to this and other similar charges, the Court of Appeals said: "Any weight to which they are entitled is dependent upon the premise that respondent sought a compromise or settlement in the bankruptcy proceeding for his own financial advantage and consequently to the detriment of the bankrupt's creditors. The record, in our view, does not establish such premise and therefore such acts become insignificant." 179 F. (2d) 361, 369.

That Fisher did seek a settlement for his own financial advantage, grossly to the disadvantage of the bankruptcy creditors, was established by the testimony of the Trustee in Bankruptcy, Horace A. Young, that at a time when $77,807.50 was tied up by the Bankruptcy Court's restraining order, Fisher proposed a settlement and drafted an order to effectuate it, under which the bankruptcy estate was to get only $23,000.00, and Fisher personally was to receive some $54,000.00 (R. 127-128).

Finally, in order that there may be no question that the Court of Appeals substituted its own discretion for that of the trial court, we quote from the opinion of the former: ". . . the heart of the controversy does not reside in a dispute as to the evidentiary facts but rather in the conclusions drawn therefrom, . . .". 179 F. (2d) 361, 370.

Reasons for Granting the Writ.

1. The decision of the court below in the instant case is directly in conflict with the decisions of this Court in the cases of *Ex parte Burr,* 22 U. S. 529, (1824), *Ex parte Secombe,* 60 U. S. 9, (1856), *Ex parte Wall,* 107 U. S. 265, (1882), *Kingsland* v. *Dorsey,* 338 U. S. 318, (1949), and others cited below, namely, that the scope of appellate review in federal disbarment proceedings is limited to the inquiry whether there was an abuse of discretion or grave irregularity. In the *Burr* case, Chief Justice Marshall said:

> "On one hand, the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him. On the other, it is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved. For these objects, some controlling power, some discretion, ought to reside in the Court. This discretion ought to be exercised with great moderation and judgment; but it must be exercised; and *no other tribunal can decide, in a case of removal from the bar, with the same means of information as the Court itself.* If there be a revising tribunal, which possesses controlling authority, that tribunal will always feel the delicacy of interposing its authority, and would do so *only in a plain case.*
>
> "Some doubts are felt in this court respecting the extent of its authority as to the conduct of the Circuit and District Courts towards their officers, but without deciding on this question, *the Court is not inclined to interpose, unless it were in a case where the conduct of the Circuit or District Court was irregular, or was flagrantly improper.*" *Ex parte Burr,* 22 U. S. 529, 530, (1824). (Emphasis supplied.)

It will be seen that this Court expressed, through Chief Justice Marshall, "some doubts . . . respecting the extent of its authority as to the conduct of the . . . District

Courts towards their officers; . . ." And it is also patent that this court "is not inclined to interpose, unless . . . in a case where the conduct of the . . . District Court was irregular, or . . . flagrantly improper." It follows, *a fortiori,* that a Court of Appeals must not upset the judgment of the lower court except upon a showing of abuse of discretion or great irregularity.

In *Ex parte Secombe, supra,* Chief Justice Taney said:

> "And it has been well settled, by the rules and practice of common law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed." *Ex parte Secombe,* 60 U. S. 9, 13.

This principle has been upheld by this Court in many subsequent cases without diminution of effect. *Ex parte Garland,* 71 U. S. 333; *Ex parte Bradley,* 74 U. S. 364; *Bradley* v. *Fisher,* 80 U. S. 335; *Randall* v. *Brigham,* 74 U. S. 523; *Ex parte Wall,* 107 U. S. 265.

2. Clearly the question presented is of great importance in the proper supervision by this Court of the federal judiciary, and in the maintenance and protection of the independence and dignity of the federal district courts. This proposition is too self-evident to require further elaboration.

3. The decision of the court below in the instant case is directly in conflict with the decisions of the Court of Appeals for the District of Columbia in the cases of *Tulman* v. *Committee on Admissions and Grievances,* 135 F. (2d) 268, (1943); and *Thomas* v. *Ogilby,* 44 F. (2d) 890, (1930). The instant decision is also in direct conflict with those of the Court of Appeals for the Second Circuit in *In Re Schachne,* 87 F. (2d) 887 (1937), and *In Re Chopak,* 160 F. (2d) 886, (1947), cert. den. 331 U. S. 835; with the decision

of the Court of Appeals for the First Circuit in *In Re Claiborne,* 119 F. (2d) 647, (1941); with the decision of the Court of Appeals for the Sixth Circuit in the case of *In Re Spicer,* 126 F. (2d) 288, (1942); and with the decision of the Court of Appeals for the Ninth Circuit in the case of *In Re Patterson,* 176 F. (2d) 966, (1949).

All of the foregoing cases, which are in conflict with the instant decision, follow the rule laid down by this Court in the cases cited above, namely, that the reviewing court will not interpose its judgment in a disbarment proceeding except upon a showing of abuse of discretion or great irregularity.

For example, in the case of *Tulman* v. *Committee on Admissions and Grievances,* 135 F. (2d) 268, (C. A. D. C., 1943), it was stated in a *per curiam* opinion:

> ". . . The record shows that appellant has never, neither here nor below, denied the truth of the charges against him. His explanation in palliation was necessarily submitted to the consideration and decision of the trial court, and it cannot be doubted that *that court,* in denying effect thereto, *exercised its judicial discretion, which is not subject to review in this court.*" 135 F. (2d) 268. (Emphasis supplied.)

In the *Tulman* case the disbarred attorney did not deny the truth of the charges against him. In the case at bar the Court of Appeals acknowledged that there was no contest over the facts. That being so, the discretion of the trial court, as the *Tulman* case clearly demonstrates, could not be subject to review in the Court of Appeals. It is respectfully submitted that the trial court's judgment should not be disturbed unless upon a clear showing of an abuse of discretion or great irregularity on the part of the District Court. The action of the Court of Appeals in the instant case strikes at the very independence, dignity, and integrity of the District Court.

In another *per curiam* opinion, the Court of Appeals for the Second Circuit held:

> "It is not within the scope of our review to re-examine the testimony, for there is no abuse of discretion shown in the action of the District Court." *In Re Schachne,* 87 F. (2d) 887, 888, (1937).

The Second Circuit so held despite the fact that Schachne, the disbarred lawyer, produced evidence to indicate that there was a recantation of testimony by witnesses who had testified against him in the disbarment proceedings in the federal court, and who later testified in a state disbarment proceeding.

And in the case of *In Re Claiborne,* 119 F. (2d) 647, (1941), the Court of Appeals for the First Circuit followed the rule promulgated by this Court in the *Burr* case, *supra,* holding:

> "In proceedings for the disbarment or the discipline of attorneys, the reviewing court will upset the judgment of the lower court only on a showing of abuse of discretion or great irregularity." *In Re Claiborne,* 119 F. (2d) 647, 650-651.

Any attempt to quote from the many other cases in point would constitute the sheerest form of tautology.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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July, 1950.

APPENDIX.

Summary of Specifications of Charges Upon Which Fisher Was Found Guilty.

I. While Fisher was the attorney for Charlotte C. Joslyn in a state court divorce proceeding against George R. Joslyn, Fisher knowingly, fraudulently and in violation of his duty as an attorney tried to obtain from George R. Joslyn compensation in the form of attorney's fees for services in the pending divorce litigation in consideration of acting or forbearing from acting in the George R. Joslyn bankruptcy matter (R. 7).

II. Fisher was the attorney for Charlotte C. Joslyn in her state court divorce proceedings and undertook to act in the United States District Court as attorney for the Benevolent and Protective Order of the Elks, a creditor in bankruptcy of George R. Joslyn, and on behalf of said Elks on June 4, 1944, obtained an order enjoining the trustees of the George R. Joslyn trusts from making any payments of income from the trusts to George R. Joslyn thus representing conflicting interests which deprived his client, Charlotte C. Joslyn, of the source of alimony and support (R. 7).

III. Fisher knowingly and fraudulently attempted to obtain from George R. Joslyn in excess of $60,000.00 in the form of attorney's fees for services rendered in the divorce proceedings in consideration of Fisher's reopening the Joslyn bankruptcy proceedings in such a manner as to effect a settlement (R. 8).

VI. Fisher represented the Elks and Charlotte C. Joslyn in the Joslyn Bankruptcy proceeding for the purpose

of forcing a settlement with the bankrupt, George R. Joslyn, which would take care of Fisher's personal claim for attorney's fees and expenses; and, after Fisher's discharge as attorney for Charlotte C. Joslyn, his activities in the bankruptcy proceeding were directed towards securing a settlement involving the payment of his personal claims for attorney's fees without regard to the amount his client, the Elks, would receive (R. 8 and 9).

VIII. On December 27, 1945, Fisher represented to the bankruptcy court that his former client, Charlotte C. Joslyn, had an equitable lien upon funds from the Joslyn Trusts accumulated in the First National Bank without apprising the court that by virtue of certain assignments from Charlotte C. Joslyn to himself, Fisher personally claimed an interest in said lien, thus violating his duty as an attorney representing creditors in failing to disclose a material fact. Furthermore, Fisher misrepresented to the court that his former client was waiting to file a petition by separate counsel in connection with said equitable lien for the purpose of creating a false impression in the mind of the court that he had no personal interest in the bankrupt's estate (R. 11).

IX. On January 14, 1946, Fisher filed a motion to strike a motion directed at restraining him from blocking the payment of a $9,000.00 check to George R. Joslyn, and he made false statements in said motion to the effect that the $9,000.00 released by the court was to be paid to himself and that George R. Joslyn owed Mrs. Joslyn more than $9,000.00 in alimony, when such were not the facts (R. 12).

X. On July 16, 1946, Fisher filed a motion in the bankruptcy court contempt proceedings instituted against him in which he represented that the divorce proceedings in the state court, in which a summons was served on the First

National Bank, as depositary of the accumulated Joslyn trust funds, were those of Charlotte C. Joslyn, without divulging his personal interest in the matter arising from the assignments of alimony made from Charlotte C. Joslyn to himself (R. 13).

XIV. Fisher violated his duty as an attorney in falsely advising his client, Charlotte C. Joslyn, by letter and wire that it was essential for her to repay money owing to him in order that he might truthfully report to the bankruptcy and divorce courts that she was not indebted to him, and in falsely stating that there were proceedings pending in the bankruptcy and divorce courts in which this fact was material (R. 14).

XV. Fisher falsely advised his client, Charlotte C. Joslyn, that George R. Joslyn was willing to settle with his creditors but was unwilling to make proper provisions for her alimony and support (R. 14).

XVI. On June 10, 1946, Fisher caused the service of a summons in the divorce proceedings to be made upon the First National Bank, as depositary of Joslyn trust funds, for the purpose of establishing a position to demand a settlement of his divorce proceeding attorney's fees in opposition to the rights of the creditors in bankruptcy; and, after his discharge as attorney for Charlotte C. Joslyn, on June 14, 1946, he disregarded his duty as attorney for creditors by persisting in asserting a lien on the funds which had been accumulated in the Joslyn trusts as a result of a restraining order procured by Fisher for the purpose of protecting the creditors (R. 15).

XVIII. On January 20, 1947, Fisher, falsely testified under oath that he never demanded his fees in the divorce proceedings as a condition to settling the bankruptcy case and that he absolutely refused to discuss the question of

attorney's fees for the purpose of obstructing justice or acting in violation of his duty as an attorney (R. 15 and 16).

XX. On January 20, 1947, Fisher falsely testified under oath that he never had a conversation with Alvin G. Hubbard in which he demanded money to see to it that the bankruptcy proceedings were dismissed (R. 16).

XXIV. Commencing January 17, 1947, and ending January 24, 1947, Fisher defied the orders of the bankruptcy court, and as a witness refused to give direct answers and make full and frank disclosure (R. 18).

FILED
SEP 7 1960

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 194

IN THE MATTER OF THE PROFESSIONAL CONDUCT OF THOMAS HART FISHER

BRIEF OF RESPONDENT THOMAS HART FISHER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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STATUTE REFERRED TO

Title 28, United States Code, §1254(1): "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

NOTE RE CITATIONS TO PRINTED RECORD.

The printed record includes two volumes, one No. 9815 (which is the record of the disciplinary proceeding in the District Court), and the other No. 9377. The former will be cited "R. ....."; the latter "Tr. #9377, p. ....."